

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-987-00
TIRussell

date:

to: Lorna A. Fenton, Case Manager CE:1103

from: District Counsel, Southern California District, Laguna Niguel

subject:

Statute Extension

This memorandum is in response to your memorandum dated February 2, 2000.

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Issues: (1) Whether the assessment date for the taxpayer has been extended at least until [REDACTED], based upon certain signed Forms 872 and/or designations of successor agents.

(2) Whether it is necessary for Exam to obtain new designations of successor agents.

Answers In Brief:

- (1) Yes, the assessment date for the taxpayer has been extended until [REDACTED].
- (2) Exam does not need to obtain new designations of successor agents (absent any changes to the successor agent corporations).

FACTS

I. Background

In a memorandum dated March 4, 1998, counsel advised Exam with respect to obtaining extensions of the limitations period for the taxable year ended [REDACTED] for a group of affiliated corporations that filed on the consolidated basis. Subsequent to the taxable year under examination, the year ending [REDACTED], the consolidated group underwent a reorganization and ownership change (detailed below).

This memorandum relies on the facts as understood by counsel in its memorandum dated March 4, 1998, as well as updated facts presented to counsel by Exam to date.

A. Generally Understood Facts as of March 4, 1998.

The taxpayer is a consolidated group, [REDACTED] [REDACTED] was the common parent of the group during the short taxable year in issue ending on [REDACTED].¹ A total of [REDACTED] corporations were included on the consolidated return of the taxpayer for the short taxable year ended [REDACTED]. The [REDACTED] subsidiaries of [REDACTED] were:

¹ Both [REDACTED] and the consolidated group are sometimes referred to as "the taxpayer."

[REDACTED]

On [REDACTED], [REDACTED] merged into [REDACTED], and [REDACTED] changed its name to [REDACTED] ("new [REDACTED]").

On [REDACTED], [REDACTED] ("new [REDACTED]") merged into [REDACTED].

As of March 4, 1998, it was understood that [REDACTED] of the [REDACTED] subsidiaries were no longer in existence, by virtue of a merger within or without the group, by dissolution or otherwise.² Those [REDACTED] subsidiaries were:

- [REDACTED], was sold out of the consolidated group on [REDACTED] to [REDACTED], a subsidiary of [REDACTED].
- [REDACTED] and [REDACTED], merged into [REDACTED] on [REDACTED]. [REDACTED], in turn, merged into [REDACTED] on [REDACTED].
- [REDACTED] merged into [REDACTED] on [REDACTED].
- [REDACTED] and [REDACTED] were both dissolved.
- [REDACTED] and [REDACTED]

² With respect to [REDACTED] and [REDACTED], as of March 4, 1998 counsel was unable to ascertain how these two subsidiaries terminated their existence. A search on Lexis/Nexis indicates that both corporations have evolved into [REDACTED], by merger or otherwise. Neither, however, remain active in the respective states under the name [REDACTED].

[REDACTED].

As of March 4, 1998, it was understood that [REDACTED] of the [REDACTED] corporations remained in existence, with no changes to corporate structure other than name changes to [REDACTED] of the corporations. These were:

[REDACTED]

C. Recommended Execution of Designations of Successor Agent, Forms 872 and 977 as of March 4, 1998.

On March 4, 1998, counsel issued a memorandum to Exam recommending execution of:

[REDACTED] designations of [REDACTED] as successor agent for the [REDACTED] affiliated group for the short taxable year ending on the effective date of its acquisition by [REDACTED] (for execution by the [REDACTED] surviving members);

[REDACTED] Forms 872, Consent to Extend the Time To Assess Tax (for execution by the successors in interest of [REDACTED] of the members no longer in existence, and the designated successor agent); and

[REDACTED] Forms 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary (for execution by the successors in interest of [REDACTED] of the members no longer in existence).

Attached to the memorandum were samples of each of the aforementioned forms and designations, with all of the appropriate language filled in. All of the designations and

³ [REDACTED] first changed its name to [REDACTED], and subsequently changed its name to [REDACTED] on [REDACTED].

Forms 872 and 977 were executed.

The extensions have been executed in [REDACTED] month increments.

D. Designations of Successor Agent

Each of the [REDACTED] former subsidiaries remaining in existence has executed a document pursuant to Treasury Regulations Section 1.1502-77 designating [REDACTED] as its successor agent with respect to the consolidated Federal income tax liabilities of [REDACTED] consolidated group for the taxable year ended [REDACTED].

The [REDACTED] designations of successor agents provided to counsel by Exam were each signed by [REDACTED] in his capacity as an officer of the [REDACTED] former members of the [REDACTED] group that still exist in the same corporate form in which they existed on the date of the acquisition. The date of execution was [REDACTED]. Pursuant to a press release, [REDACTED] resigned effective [REDACTED].

Previously, in [REDACTED], the officer that preceded [REDACTED], [REDACTED], also signed [REDACTED] designations of successor agents in his capacity as an officer of the [REDACTED] former members of the [REDACTED] group that still exist in the same corporate form in which they existed on the date of the acquisition.

E. Forms 872

There are [REDACTED] executed Forms 872 extending the assessment period for the taxable year ended [REDACTED] to [REDACTED]. The named taxpayers in the Forms 872 are as follows:

[REDACTED]

[REDACTED]

group pursuant to Temp. Treas. Reg. Sec. 1.1502-77T.

Each of the Forms 872 states that it "is with respect to the consolidated Federal income tax liability of the [REDACTED] [REDACTED]. ([EIN]) consolidated group for the taxable year ended [REDACTED]."

F. Forms 977

There are [REDACTED] executed Forms 977. Each Form 977 is for the tax period ended [REDACTED], and extends the assessment period to [REDACTED].

The Forms 977 reflect the following respective transferee or fiduciary liabilities:

[REDACTED]

Each Form 977 states that it "is with respect to the consolidated Federal income tax liability of the [REDACTED] [REDACTED] ([EIN]) consolidated group for the taxable year ended [REDACTED]."

G. Summary

The following table summarizes the foregoing executed documents based upon the [REDACTED] member consolidated group of [REDACTED].

	<u>977</u>	<u>872</u>	<u>1.1502-77</u> <u>Designee</u>	<u>Out of</u> <u>Existence</u>
[REDACTED]		✓*		✓
[REDACTED]	✓	✓		✓
[REDACTED]	✓	✓		✓
[REDACTED]	✓	✓		✓
[REDACTED]	✓	✓		✓
[REDACTED]	✓	✓		✓
[REDACTED]			✓**	
[REDACTED]			✓**	
[REDACTED]			✓**	
[REDACTED]			✓**	
[REDACTED]				✓
[REDACTED]				✓
[REDACTED]				✓

* [REDACTED], as alternative agent for the [REDACTED] * ([EIN]) consolidated group pursuant to Temp. Treas. Reg. Sec. 1.1502-77T.

** [REDACTED] is the designated successor agent.

[REDACTED] corporations executed Forms 872. [REDACTED] has executed a Form 872 as alternative agent for the remaining members still in existence. The following [REDACTED] corporations executed Forms 872 as successors in interest:

[REDACTED]

The [REDACTED] signatory corporations for the Forms 977 are:

[REDACTED]

⁴ As a clarification, [REDACTED], was sold out of the consolidated group on [REDACTED] to [REDACTED], a subsidiary of [REDACTED].

[REDACTED]

The latest Forms 872 were executed with a written notice to the taxpayer of its right to refuse or limit the extensions pursuant to section 6501(c)(4)(B). At that time, the internet website for the [REDACTED] Secretary of State indicated that [REDACTED] remained active and in good standing.

II. Developments After March 4, 1998 and Through April, 2000.

On [REDACTED], [REDACTED] changed its name to [REDACTED].

On [REDACTED], [REDACTED] merged into [REDACTED].

Effective [REDACTED], [REDACTED] merged into [REDACTED]. At the time the Forms 872 and 977 were executed, however, the signing officer did not alert or notify Exam of the merger, the and the website for the [REDACTED] Secretary of State indicated that [REDACTED] remained active and in good standing.

In addition, between [REDACTED] and [REDACTED], [REDACTED] merged into [REDACTED].⁵

Organizational charts provided by [REDACTED] are attached hereto. Also attached as "Addendum A" are diagrams reflecting the changes to the corporations, with supporting documentation as exhibits.

⁵ The Articles and Plan of Merger indicate the merger was intended to be effective as early as [REDACTED]. The [REDACTED] Secretary of State website records for [REDACTED] list a merger on [REDACTED] (but it does not identify [REDACTED]). Exam has not obtained the corresponding merger documents.

LEGAL ANALYSIS

I. Law.

In general, the common parent corporation and each subsidiary which was a member of the group during any part of the consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. §1.1502-6(a).

Generally, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having also been given or executed by each such subsidiary. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id.

An agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year is applicable to each corporation which was a member of the group during any part of such taxable year, and to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of section 1.1502-75. Treas. Reg. § 1.1502-77(c).

Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

If for any reason the common parent corporation's existence is about to terminate, the regulations require that it notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. Treas. Reg. § 1.1502-77(d).

If the notice thus required is not given by the common parent, or the designation is not approved by the district director, the remaining members may, subject to the approval of such district director, designate another member to act as such

agent, and notice of such designation shall be given to such district director. Id. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability. Id.

Temporary Regulation section 1.1502-77T, promulgated in 1988 to supplement Treas. Reg. section 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. section 1.1502-77(a).⁶ In general, where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. section 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations.

Under Temp. Reg. section 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
- (iii) The agent designated by the group under section 1.1502-77(d), or
- (iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

The period of limitations for the assessment of transferee liability is 1 year after the expiration of the period of limitations against the transferor. § 6901(c). The additional one-year period of limitations runs from the date of expiration of the original period of limitation for assessment against the transferor, as properly extended by consents of the transferor. Dardi v. United States, 252 F.2d 670 (9th Cir. 1958), aff'g per

⁶ Temp. Reg. section 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. section 1.1502-77T(b).

curiam United States v. Mission Company, 57-2 USTC ¶ 9782 (N.D. Cal. 1957).

II. Analysis.

A. The Forms 872.

The common parent at the close of the taxable year in issue, [REDACTED], has merged out of existence.

The [REDACTED] surviving members of the taxpayer's consolidated group-- [REDACTED],⁷ [REDACTED],⁸ and [REDACTED]⁹ have each designated [REDACTED] as the successor agent with respect to the consolidated Federal income tax liabilities of [REDACTED] consolidated group for the taxable year ended [REDACTED].¹⁰ See Treas. Reg. § 1.1502-77(d).

Accordingly, [REDACTED] has the express, written authority to extend the limitations period with respect to each of the [REDACTED] surviving members. However, we recommend that Forms 872 continue to be executed by the successors in interest to any of the former members of the group that are no longer in existence.

The Forms 872 executed by [REDACTED] and the successors in interest for the former members no longer in existence, operate to extend the assessment period for the taxable year ended [REDACTED] of the [REDACTED] consolidated group to [REDACTED]

⁷ Formerly known as [REDACTED]. As a result of a merger, successor in interest to [REDACTED], which in turn was a successor in interest to [REDACTED].

⁸ Formerly known as [REDACTED], which in turn was formerly known as [REDACTED], and successor in interest to [REDACTED] and the old [REDACTED].

⁹ Formerly known as [REDACTED].

¹⁰ Counsel assumes that the common parent, [REDACTED], did not give the required notice of termination or designate another member to act as agent.

2000.¹¹ Treas. Reg. sections 1.1502-75(c) and (d), 1.1502-77T(a)(3) and (4)(iii).

B. The Forms 977.

The corporations that have executed the Forms 872 as successors in interest, have also executed Forms 977 as transferees.¹² The memorandum of March 4, 1998 recommended execution of the Forms 977 as a precautionary measure. The taxpayer has indicated that it prefers not to have to execute so many forms, and that it will likely decline to sign future Forms 977. We will be happy to discuss Exam's options if such is the case when Exam next asks for Forms 977.

C. The Designations of Successor Agent.

Absent a change in the corporate form, name, or otherwise to the [REDACTED] former members of the [REDACTED] group still in existence, it is not necessary to execute new designations of successor agent annually. Nor is it necessary to execute new designations simply because of a change in personnel with respect to the officer who signed the forms.

¹¹ We believe the Forms 872 executed by [REDACTED] --after the effective date of its merger into [REDACTED] --are defensible. As a practical matter, however, it is a nonissue because there are ample assets to cover any liability by virtue of the Forms 872 executed by [REDACTED].

For all future Forms 872 for which [REDACTED] was signing as a successor in interest, such Forms should be executed by "[REDACTED], as successor in interest to [company].* (EIN)". Include at the bottom of the page an asterisk with the following: "* This is with respect to the consolidated Federal income tax liability of the [REDACTED] consolidated group for the taxable year ended [REDACTED]."

¹² See preceding footnote. For all future Forms 977 for which [REDACTED] was signing as a transferee, such Forms should be executed by "[REDACTED]."

CONCLUSION

The assessment date for the taxpayer has been extended until September 30, [REDACTED]. Exam does not need to obtain new designations of successor agents (absent any changes to the successor agent corporations).

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Attachments: as stated.